THE BANK OF PUNJAB v. LEE KAM SUN & ORS

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[ORIGINATING SUMMONS NO: 24-1580-12-2012]
21 JULY 2015

LAND LAW: *Ownership – Claim for – Application for various declarations, orders and consequential reliefs – Land frozen and seized by Royal Malaysian Police – Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 51 & 54 – Whether notice of seizure endorsed on document of title – Whether seizure still in force – Registrar's caveat lodged over land – Land auctioned and sold to third defendant – Whether bank had beneficial ownership of land – Whether bank had interests in land – Whether bank had indefeasible title of land*

In 2008, three Pakistani citizens ('the Pakistani criminals') had defrauded the plaintiff for a sum of Rp 9 billion. The Pakistani criminals, one of them known as Harris Afzal ('Harris'), were tracked to be in Malaysia and their assets were identified, froze and seized under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') ('the AMLA investigation'). Among the assets was the property disputed in this case, which was held under the name of Harris. The Royal Malaysian Police ('RMP') issued a freezing order under s. 4 of the AMLATFA and requested the fifth defendant to lodge a Registrar's caveat ('the PDRM caveat'). A notice of seizure was issued and served on the Land Administrator and/or the Registrar of Titles in accordance with s. 51(1)(c) of the AMLATFA. Unknown to the plaintiff, the first and second defendants filed an action against Harris, claiming that they were the original owners of the property and that they were not fully-paid in the sale transaction. Even though Harris was already deported to Pakistan, the first and second defendants effected service of writ and statement of claim by substituted service order at an address that did not belong to Harris. Thereafter, the first and second defendants successfully obtained a judgment in default of appearance ('JID') for a sum of RM850,000. The JID order was then enforced by way of seizure and sale. Through an AMLA order by the High Court, all the ownership, rights and interests in the property were vested in the plaintiff, making the latter the lawful and beneficial owner of the said property. The first and second defendants procured the court to auction the property and this was later discovered by the plaintiff. Various court and land searches were conducted and the plaintiff found out that the property had been sold to the third defendant. In the present application, the plaintiff sought various declarations, orders and consequential reliefs in relation to its legal and beneficial ownership of and interests in the property.

Held (allowing application with costs):

(1) Failure to endorse the said notice of seizure on the document of title is an offence under s. 51(5) of the AMLATFA. Section 51(6) makes it an offence for a registered proprietor of immovable property who has knowledge of the said notice of seizure to enter into any agreement to sell, transfer or otherwise dispose of such property. Section 51 is reinforced by s. 54 of the same Act which reiterates that any dealing of a seized property shall be null and void. Upon issuance of the notice of seizure, no civil proceeding whatsoever can be taken in respect of the property when the seizure is in force, except with the written consent of the Public Prosecutor. (paras 9 & 10)

(2) It would be unjust to the plaintiff to be made to suffer the consequences of the fifth defendant's negligence and non-compliance with the explicit terms of the AMLATFA which itself amounted to a criminal offence. On the undisputed evidence of the fifth defendant's omission and negligence as elaborated, there was shown clear contravention and defiance of substantive statutory prohibitions and obligations under AMLATFA. Flowing from this, the only conclusion that could be drawn was that all dealings with the subject property after the issuance of the notice were rendered null and void on the grounds of illegality and lack of jurisdiction. (para 12)

(3) Any dealing subsequent to the notice of seizure issued by the Public Prosecutor pursuant to s. 51(1) of the AMLATFA as well as proceedings brought by the defendants thereafter involving the subject property are in clear contravention of provisions of the Act, *ie*, ss. 51 and 54, resulting in the said dealings and proceedings being rendered invalid, null and void under the Act. The omission and negligence of the defendant after being duly served the notice of seizure to endorse the terms of the notice on the document of title of the subject property which caused the present predicament contravened the substantive statutory provisions of the Act. This omission and contravention rendered all the dealings following the issuance of the notice to be null and void on the grounds of illegality and lack of jurisdiction. (paras 18 & 19)

(4) A court is not *functus officio* even though a default judgment or order that was entered had been perfected and retained the jurisdiction to set it aside in appropriate circumstance. Where an order of the court, as in the case of the judgment in default in this case obtained against Harris by the first and second defendants, is proved to be null and void on the ground of illegality or jurisdictional error, it has to be set aside *ex debito justitae*. (paras 11 & 13)

(5) It is established principle that in this jurisdiction, the law applicable on this issue is, not immediate indefeasibility. Any title obtained as a result of fraud or in contravention of law, as in the case of that obtained by the third defendant, is subsequently defeasible under s. 340(2) of the National Land Code on the grounds therein if the circumstances so justify, although the third defendant was not a party to the fraud but a *bona fide* purchaser for value. A title, though obtained by a *bona fide* purchaser for value, is liable to be set aside if it is obtained through void instruments. (paras 14 & 15)

(6) The plaintiff, as the actual and beneficial owner of the subject property had been gravely prejudiced and denied its lawful right to the subject property as a consequence of the fraud committed by the Pakistani criminals and the acts or omissions of the defendants. The circumstances of this case require that the original position of the parties and the property be restored to *status quo* as it should have been after issuance of the notice of seizure by the public prosecutor. (para 21)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

MacQuarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal [2007] 6 CLJ 176 CA ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 44, 51(1), (2), (3), (5), (6), 54

National Land Code, ss. 340(1), (2), 420(2), (3)

For the plaintiff - Bahari Yeow (Andy Tan with him); M/s Lee Hishammuddin Allen & Gledhill

For the 1st & 2nd defendants - Nursyamiza Zainal Abidin; M/s Nur Syamiza Zainal & Partners

For the 3rd defendant - HM Lee; M/s H M Lee

For the 5th defendant - Mohammad Mustaffa; Legal Advisor

For the 6th defendant - Hajinder Singh; M/s Shaikh David Raj

Reported by Najib Tamby

JUDGMENT

Gunalan Muniandy JC:

[1] This is the plaintiff bank's originating summons for various declarations, orders and consequential reliefs in relation to the plaintiff's legal and beneficial ownership of and interests in a property held under Lot 21819, Grant No. 222376, Bandar Country Heights, Ulu Langat, Selangor ('the subject property'). The main declarations and orders sought by the plaintiff are these:

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(a) a declaration that by reason of the Notice of Seizure dated 15.2.2010 issued pursuant to Section 51(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA 2001"), one Harris Afzal no longer had any legal and beneficial ownership and interests over a property held under Lot 21819, Geran No. 222376, Bandar Country Height, Daerah Ulu Langat, Selangor Darul Ehsan ("the Property");

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(b) a declaration that by reason of the Court Order dated 27.10.2011 in the Criminal Application Suit No: 44-17-2011, the complete legal and beneficial ownership and interests in the Property had been vested upon the Plaintiff;

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(c) a declaration that any dealing with the Property (subsequent to Notice of Seizure dated 15.2.2010 and/or Criminal Application Suit No: 44-17-2011 Court Order dated 27.10.2011) is a nullity, void and unlawful, and liable to be defeated and set aside;

(d) a declaration that the service of the Writ of Summons dated
D 22.03.2010 and Statement of Claim dated 15.03.2010 is null and void leading to the subsequent Judgment in Default dated 17.09.2010 obtained by the 1st and 2nd Defendants against Harris Afzal as a nullity, void and unlawful, and liable to be set aside;

(e) a declaration that the AE Suit No. 37-28-2011 Writ of Seizure and
E Sale Order dated 20.6.2011 ("WSS Order") and/or any proceeding consequent upon and/or subsequent to the WSS Order including the auction of the Property held in 18.6.2012 is a nullity, void and unlawful and any instruments executed thereto is insufficient and void;

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(f) a declaration that the removal of the Registrar's Caveat on the Property bearing the presentation number 57774/2009 by the 5th Defendant is a nullity, void and unlawful;

(g) a declaration that any title or interests obtained by the 3rd Defendant was obtained by means of an insufficient or void instrument, and/or acquired unlawfully, and therefore be set aside;

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(h) an order that any monies paid by the 3rd Defendant into court in relation to and/or connected with AE Suit No. 37-28-2011 WSS Order and/or any proceeding consequent upon and/or any subsequent to the WSS Order including the auction of the Property held on 18.06.2012 and the consequent transaction of the Property
H involving the 3rd Defendant shall not be remitted to the 1st and 2nd Defendants and/or the 4th Defendant and/or Harris Afzal and/or their solicitors, agents, servants or otherwise until the full and final determination of this matter and if the monies have been paid out and/or are held by the Defendants or any one of them and/or by Harris Afzal, whether by themselves, their solicitors, agents,
I servants, or otherwise be deemed to be held by the Plaintiff's solicitors as stakeholder and/or constructive Trustee or shall be held by this Honourable Court until final disposal of this suit or until such other further Orders of this Honourable Court;

(i) an order that the 5th Defendant remove and cancel the 3rd Defendant's registered Land Title over the Property and any other instrument that may affect the Plaintiff's ownership and interest over the said Property and as a consequence, the Charge in favour of the 6th Defendant be declared to be null and void and of no effect;

(j) an order that the 5th Defendant remove and cancel the 6th Defendant's Charge (Presentation Number: 115102/2012) over the Property;

(k) an order that the 5th Defendant issue and serve a new Land Title over the Property in favour of the Plaintiff;

(l) a declaration that by reason of the Court Order dated 27.10.2011 in the Criminal Application Suit: 44-17-2011, the complete legal and beneficial ownership and interests of the "barangan" in the Property had been vested upon the Plaintiff; ...

Background And Chronology Of Events

[2] I would adopt the following relevant passages from the background facts narrated in the plaintiff's written submission:

1.1. The Plaintiff is a National Bank of Pakistan incorporated under the Bank of Punjab Act 1989 ("BOP")

1.2. In 2008, three Pakistani citizens, namely Harris Afzal and his two family members. Sheikh Muhammad Afzal Hamza Afzal ("the Pakistani Criminals") had defrauded BOP for a sum of Rp 9 Billion. This fact is set out in an affidavit dated 26.1.2011 by the Deputy Public Prosecutor Tuan Anselm Charles Fernandis.

1.3. By the way of a Govt to Govt assistance plan, the Pakistani Criminals were tracked to be in Malaysia and the Royal Malaysian Police ("RMP") identified, froze and seized various of their assets under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA 2001") ("the AMLA Investigation").

1.4. By early 2009, the Pakistani Criminals were already deported to Pakistani where they appeared before the Supreme Court of Pakistan and made various admissions contained in two Orders dated 10.05.2009. The Pakistani Criminals have since then not returned to Malaysia.

1.5. One of the assets that was seized included this Property which was registered in the name of Harris Afzal.

1.6. On 30.11.2009, RMP issued a Freezing Order under Section 44 AMLATFA 2001 and requested the 5th Defendant to lodge a Registrar's Caveat ("the PDRM's caveat") to prevent any dealings over the Property for the purpose of the AMLA Investigations.

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1.7. Subsequently, a Notice of Seizure dated 15.2.2010 ("Notice of Seizure") was issued by the Public Prosecutor pursuant to Section 51(1)(a) AMLATFA 2001. The Notice of Seizure was duly served on the Land Administrator and/or the Registrar of Titles in accordance with Section 51(1)(c) AMLATFA 2001.

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1.8. The effect of the said Notice of Seizure under section 51 and Section 54 of AMLATFA 2001 is to prohibit all dealings in respect of the immovable property and any dealing affected by any person shall be null and void.

1.9. Under Section 51(2) of AMLATFA 2001, the 5th Defendant was under a duty to immediately endorse the terms of the Notice of Seizure on the document of title of the Property in the Register of Titles.

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1.10. Unknown to the Plaintiff, on 22.03.2010, the 1st and 2nd Defendants filed a Writ Action in Shah Alam High Court Civil Suit No. 22-377-2010 against Harris Afzal claiming that they were the original owners of the Property, and that they were not fully paid in the sale transaction. The claim was not based on a written agreement and consisted of an alleged principal amount of RM500,000.00; repair costs for a sum of RM100,000.00; and purported penalty interest of RM250,000.00.

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1.11. Although Harris Afzal was already deported to Pakistan, the 1st and 2nd Defendants effected service of the Writ and Statement of Claim by Substituted Service Order at an address that does not belong to the said Harris Afzal.

1.12. On 17.09.2010, the 1st and 2nd Defendants obtained a Judgment in Default of Appearance ("the JID Order") for a sum of RM 850,000.00.

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1.13. On 07.06.2011, the 1st and 2nd Defendants enforced the JID Order by way of a Writ of Seizure and Sale on the said Property for a sum of RM 1,150,000.00.

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1.14. By a Court Order dated 27.10.2011 issued by the Shah Alam High Court in a Criminal Application Suit No. 44-17-2011 ("AMLA Order"), all the ownership, right and interests in the Property were vested by the Court in the Plaintiff making the Plaintiff as the lawful and beneficial owner of the said Property.

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1.15. Pursuant to the AMLA Order, the Plaintiff has disposed various assets of the Pakistani Criminals to recover the losses it suffered caused by the Pakistani Criminals. The Plaintiff has also taken possession of the Property including placing security guard to guard the Property.

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1.16. On 29.12.2011, the Plaintiff's Solicitor published a Legal Notice in the national newspaper to notify the public that the Plaintiff is the beneficial and lawful owner of the Property and that no one is permitted not authorised to deal, sell or auction the Property without the consent of the Plaintiff and its solicitors.

1.17. On 18.6.2012, unknown to the Plaintiff, the 1st and 2nd Defendants procured the Court to auction the Property.

1.18. On 17.10.2012 a person known as Kevin identified himself to the security guard at the Property that he is the new owner of the Property, then trespassed into the Property by breaking an entry, taking possession and changing the locks of the Property in complete disregard to the protestations of the security guard.

1.19. The Plaintiff considers this self-help method to be unlawful, and on 18.10.2012 lodged a police report.

1.20. On 17.10.2012 alarmed by the unlawful self-help action mentioned above, the Plaintiff conducted various Court and Land Office searches and discovered:

(a) the Writ Action commenced by the 1st and 2nd Defendants against the said Harris Afzal and the subsequent execution action;

(b) that the Property has been sold to the 3rd Defendant at an auction held on 18.6.2012 at a price of RM3,510,000.00.

(c) that the 4th Defendant had acted for the 1st and 2nd Defendants and had claimed the proceeds of the auction to be paid into his firm's account

(d) that the 3rd Defendant had paid into Court the full purchase price; and

(e) that the 3rd Defendant had filed an application for removal of the PDRM's caveat.

1.21. By letter dated 13.09.2012, the State Legal Advisor ("SLA") acting for the 5th Defendant sought the RMP's view on the lifting and/or removal of the PDRM's Caveat.

1.22. On 14.9.2012, the PDRM's Caveat was removed/cancelled by the Pejabat Pengarah Tanah dan Galian Negeri Selangor ("PTG") without due notice to the RMP or the Plaintiff.

1.23. On 20.09.2012, the 3rd Defendant entered into a Consent Order with the 5th Defendant to remove the PDRM's caveat ("Consent Order") without due notice to the RMP and the Plaintiff.

1.24. By letter dated 25.09.2012, the RMP informed the SLA that the Shah Alam High Court had made the AMLA Order dated 27.10.2011 vesting the ownership of the Property to the Plaintiff. The RMP was under the misconception that the removal of the caveat was for the benefit of the Plaintiff pursuant to the AMLA Order and as such stated that they had no objection thereto.

[3] *Vide* letters dated 24 October 2012, the plaintiff's solicitors took the following steps:

(a) sought the Senior Assistant Registrar ('SAR')'s assistance to retain any payment made by the third defendant and not to release the monies to any other parties;

A (b) sought the PTG's assistance to prevent any transfer of the land title to D3 or any other parties;

(c) sought the assistance of the AG's Chambers and the RMP to request the SAR and the PTG to abide by the AMLA Order; and

B (d) notified the above parties that the JID, the WSS and all subsequent execution process were irregular and that the plaintiff was taking steps to ensure compliance with the AMLA Order.

[4] Thereafter, the chronology of events leading to the instant action is as follows:

C By a letter dated 7.11.2012, the Special Task Force of the RMP wrote to the Plaintiff's solicitors, amongst others, to inform that they were never contacted by the 5th Defendant prior to the letter dated 13.09.2012 regarding the Registrar's Caveat. The RMP also confirmed that the Notice of Seizure was served and acknowledged by an officer of the 5th D Defendant, Mohd Nazrul Bin Ngaimin.

By letter dated 16.11.2012 to the SAR, the Plaintiff's solicitors requested clarification from the SAR on the amount of money that was released to the 1st, 2nd or 4th Defendants and to not release any surplus monies other than as stipulated by the JID Order until matters are clarified.

E By letter dated 19.11.2012, the SLA denied knowledge of the AMLA Order although the Notice of Seizure was served on the 5th Defendant by the RMP. The SLA failed to address the removal of the PDRM's Caveat on 14.09.2012 without due notice to RMP and the Plaintiff.

On 30.11.2012, in order to preserve the situation, the Plaintiff lodged a F Private Caveat over the Property.

By letter dated 17.12.2012, the Plaintiff's solicitors that the 3rd Defendant's self-help method and continued occupation constitute trespass and that any appropriation of the fixtures in the Property would constitute conversation and unlawful.

G By letter dated 18.12.2012, the 3rd Defendant's solicitors proposed a compromise in regards to the fixtures in the Property and requested removal of the private caveat lodged by the Plaintiff as they were intending to sell the Property to a new third party buyer. The Plaintiff views this seriously as any subsequent disposal of the Property would result in the Property being irrecoverable and cause irreparable loss and H damage to the Plaintiff's right and interests.

Having served the Plaintiff's Originating Summons, Affidavit in Support and Notice of Application (*Ex Parte*) ("the Injunction Application"), by letter dated 21.12.2012 the Plaintiff reiterated to the 3rd Defendant's solicitors that the JID Order and all subsequent enforcement including the I auction were void.

By letter dated 27.12.2012 the 3rd Defendant's solicitors denied the trespass.

On 02.01.2013, during the *Ex Parte* hearing of the Injunction Application, the 4th Defendant produced to the Court a Bailiff's Statement which showed that the full proceeds of the auction, less costs and commissions, amounting to RM 3,451,848.59 had been paid out to the 1st and 2nd Defendants.

Consequently, this Honourable Court granted an *Ex-parte* Interim Injunction dated 02.01.2013 namely prayers (1), (2), (3) and (4) to preserve the *status quo* of the matter.

By letter dated 04.01.2013, the Plaintiff's solicitors sought clarification from the SAR on the Bailiff's Statement and reiterated its position that the SAR ought not to have paid out to the 1st and 2nd Defendants more than the JID order and any payment in excess thereto is wrongful.

On 16.1.2013, the *Inter Partes* hearing was heard and the Court granted an *Ad Interim* Injunction Order ("the 1st Order"). The Court also further directed at paragraphs 3 and 4 of the Order that the 1st and 2nd Defendants are to pay an amount of RM 3,451,848.59 ("the said amount") into Court within 7 days from the receipt of the 1st Order.

The 1st Order was personally served on the 1st and 2nd Defendants on 08.03.2013. The 1st and 2nd Defendants were to comply with the 1st Order on or before 16.03.2013 but this was never done until today.

On 21.03.2013, the Interim Injunction hearing was heard in the presence of the 1st and 2nd Defendants' solicitors and the Court allowed Enclosure 4 by granting an Interim Injunction Order dated 21.03.2013 ("the 2nd Order") and made further directions at paragraphs 3 and 4 which compels the 1st and 2nd Defendants to pay the said amount on or before 25.03.2013, 2.30 p.m. The directions at paragraph 3 and 4 of the 2nd Order are not an extension of time for the 1st and 2nd Defendants to comply with the 1st Order.

On 25.03.2013, the 1st Defendant was present in Court and applied for an extension of time of 14 days to comply with the Order dated 21.03.2013. This Honourable Court dismissed the application for extension of time sought by the 1st Defendant and directed the 1st and 2nd Defendants to pay the said amount on or before 29.03.2013, 3.00 p.m. ("the 3rd Order"). The 3rd Order is not an extension of time for the 1st and 2nd Defendants to comply with the 1st and 2nd Orders.

On 29.03.2013, the 1st and 2nd Defendants still failed to comply with the 1st and 2nd and 3rd Orders and through their newly appointed counsel, Mr. Gurbahcan Singh, undertook to pay RM2 million into Court within 14 weeks form 29.03.2013. On 16.04.2013 the 1st and 2nd Defendants sought an adjournment to their Application for, amongst others, an extension of time to comply with the 3 Orders and counsel for the 1st and 2nd Defendants informed the Court that the 1st and 2nd Defendants did not pay the RM2,000,000.00 as undertaken by them.

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The Relevant Law

[5] In this case, the Registrar's caveat was registered on the application of the Royal Malaysian Police ('RMP') based on a freezing order issued by the RMP pursuant to s. 44 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). The relevant parts of the section are as below:

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> Section 44. Freezing of property.
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> (1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person, or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.
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> (2) An order under subsection (1) may include:
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> (a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order; and
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> (4) An order made under subsection (1) may direct that the person named or described in order shall:
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> (a) be restrained, whether by himself or by his nominees, relatives, employees or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;
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> (5) An order made under subsection (1) shall cease to have effect after ninety days from the date of the order, if the person against whom the order was made has not been charged with an offence under this Act or a terrorism financing offence, as the case may be. ...

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[6] As for the notice of seizure dated 15 February 2010 issued by the Public Prosecutor ('PP') it was pursuant to s. 51(1) of AMLATFA 2001 which provides that:

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> Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is the subject-matter of an offence under subsection 4(1) or a terrorism financing offence or evidence of the commission of such offence or is terrorist property, such property may be seized, and the seizure shall be effected.
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> (a) by the issue of a Notice of Seizure by the Public Prosecutor setting out the particulars of the immovable property which is seized in so far as much particulars are within his knowledge, and prohibiting all dealings in such immovable property;
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> (b) by publishing a copy of such Notice in two newspapers circulating in Malaysia, one of which shall be in the national language and the other in the English language; and

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(c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land titles, as the case may be, in Sarawak, of the area in which the immovable property is situated.

[7] The duty of the land office upon being served with the notice of seizure under s. 51(1) is prescribed in s. 51(2) as follows:

> The Land Administrator, the Collector of Land Revenue, the Director of Lands and Surveys, the Registrar of Titles or the Registrar responsible for land titles, as the case may be, referred to in subsection (1) shall immediately upon being served with a Notice of Seizure under that subsection endorse the terms of the Notice of Seizure on the document of title in respect of the immovable property in the Register at his office.

[8] As for the effect of the above endorsement, s. 51(3) of the AMLATFA 2001 states that:

> Where an endorsement of a Notice of Seizure has been made under subsection (2), the Notice shall have the effect of prohibiting all dealings in respect of the immovable property, an after such endorsement has been made no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such Notice or the making of such endorsement.

[9] Failure to endorse the said notice of seizure on the document of title is an offence under s. 51(5) of the AMLATFA. The following sub-s. (s. 51(6)) makes it an offence for a registered proprietor of immovable property who has knowledge of the said notice of seizure to enter into any agreement to sell, transfer or otherwise dispose of, etc. such property.

[10] Section 51 AMLATFA is reinforced by s. 54 of the same Act which reiterates that any dealing of a seized property shall be null and void. Upon issuance of the notice of seizure, no civil proceeding whatsoever can be taken in respect of the property when the seizure is in force, except with the written consent of the PP. This section provides that:

> Section 54. Dealing with property after seizure to be void.
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> (1) Where any property has been seized under this Act, and so long as such seizure remains in force, any dealing affected by any person or between any persons in respect of such property, except any dealing affected under this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority.
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> (2) Subsection (1) shall be in addition to and not in derogation of subsections 51(3) and (4).

[11] It is trite law that a court is not *functus officio* even though a default judgment or order that was entered has been perfected and retains the jurisdiction to set it aside in appropriate circumstances. In *MacQuarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal* [2007] 6 CLJ 176; [2007] 7 MLJ 139 it was held that:

> The principles enunciated in *Hock Hua Bank Bhd v. Sahari Murid* [1981] 1 MLJ 143; *Badiaddin bin Mohd Mahadin & Anor v. Arab Malaysian Finance Bhd* [1981] 1 MLJ 393; and *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)* [2003] 1 MLJ 251 supported the appellant's contention that the court was not *functus officio* even though a default judgment has been perfected. However, these three authorities have also reaffirmed that the jurisdiction to set aside such a judgment was not to be exercised as a matter of course, but may be exercised in limited circumstances only where there was: (a) breach of the rules of natural justice; (b) lack of jurisdiction; (c) illegality, ie, contravention of a substantive statutory provision; (d) serious defect; or (e) fraud. The appellant must discharge the burden of proving that the impugned application came within the ambit of any of these limited circumstances.

Analysis And Finding

[12] The thrust of the plaintiff's case was that all dealings and proceedings brought by the defendants relating to the subject property subsequent to the issuance of the notice of seizure have clearly contravened the provisions of the AMLATFA, specifically s. 51 and s. 54 which led to the said dealings and proceedings being rendered invalid and void under this Act. Having taken into consideration the unequivocal provisions of AMLATFA adverted to, this was indeed the case in the present instance where the said provisions were blatantly infringed and disregarded by the defendants concerned, save for defendants (3) and (6). As rightly contended, it would be unjust to the plaintiff to be made to suffer the consequences of the fifth defendant's negligence and non-compliance with the explicit terms of AMLATFA which itself amounts to a criminal offence. On the undisputed evidence of the fifth defendant's omission and negligence as elaborated, there was shown clear contravention and defiance of substantive statutory prohibitions and obligations under AMLATFA. Flowing from this, the only conclusion that could be drawn was that all dealings with the subject property after the issuance of the notice were rendered null and void on the grounds of illegality and lack of jurisdiction.

[13] Where an order of the court, as in the case of the judgment in default in this case obtained against Harris by defendants (1) and (2), is proved to be null and void on the ground of illegality or jurisdictional error, it has to be set aside *ex debito justitae*. This was emphatically made clear by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, as follows:

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It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make. ...

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The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

D

[14] Central to this action is the trite law principle of indefeasibility of title under s. 340(1) NLC. It is established principle that in this jurisdiction the law applicable on this issue is deferred, not immediate, indefeasibility. Any title obtained as a result of fraud or in contravention of law, as in the case of that obtained by the third defendant, is subsequently defeasible under s. 340(2) NLC on the grounds therein if the circumstances so justify, although D3 was not a party to the fraud but a *bona fide* purchaser for value.

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[15] It is trite law that a title, though obtained by a *bona fide* purchaser for value, is liable to be set aside if it is obtained through void instruments. This proposition is to be found in the Federal Court judgment in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 where it was held *inter alia*:

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We must stress that, the fact that the 3rd respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor ...

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[16] From the facts and circumstances of the present matter, it would be save to surmise that the material facts referred to were not presented wholly to the court in the action purportedly initiated by the first and second defendants and/or in the execution proceedings that ensued thereafter. This court is seized with the jurisdiction to set aside the earlier orders should they be found to be null and void by reason of illegality and/or lack of jurisdiction.

I

[17] The AMLA Order dated 27 October 2011 affecting the subject property which to date still remains in force is valid, binding and enforceable as it has not been set aside. It does not fall within the purview of s. 420(3) NLC which imposes statutory obligations on the court and the Registrar or land administrator. Failure to comply with s. 420 NLC by the parties concerned does not affect the validity or enforceability of the order. Any dealing on the subject property subsequent to the AMLA Order is, hence, a nullity, void and unlawful and liable to be defeated and set aside. The AMLA Order was made in furtherance of the notice of seizure dated 15 February 2010 which vested the beneficial and legal ownership of the subject property on the plaintiff. Notwithstanding the notice of seizure and the AMLA Order, on the admitted or proven facts, the defendants continued to pursue and commenced dealings with the subject property which were thus, void and unlawful, particularly the auction sale of the property on 18 June 2012 premised on the void and unlawful judgment in default against the said Harris. A plain reading of s. 420(2) and (3) NLC giving the words their natural and ordinary meaning, would disclose that the statutory obligation imposed therein do not override the AMLA Order. For ease of reference the provisions of s. 420 NLC are reproduced below:

> (1) Notwithstanding anything in any other written law, no order of the court vesting any alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.
>
> (2) The court shall, accordingly, cause a copy of any such order to be served on the Registrar or, as the case may be, Land Administrator forthwith after the making thereof; and the Registrar or Land Administrator, upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.
>
> (3) The Registrar or Land Administrator shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.
>
> (4) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

[18] Thirdly, any dealing subsequent to the notice of seizure issued by the Public Prosecutor pursuant to s. 51(1) of the AMLATFA 2001 as well as proceedings brought by the defendants thereafter involving the subject

property are in clear contravention of provisions of the Act, ie, ss. 51 and 54 resulting in the said dealings and proceedings being rendered invalid, null and void under the Act.

[19] Fourthly, the omission and negligence of the fifth defendant after being duly served the notice of seizure to endorse the terms of the notice on the document of title of the subject property which caused the present predicament contravened the substantive statutory provisions of the Act. This omission and contravention rendered all the dealings following the issuance of the notice to be null and void on the grounds of illegality and lack of jurisdiction.

[20] I agree with the plaintiff's contention that the facts and circumstances of the instant matter clearly disclose that the facts were not wholly presented in the action purportedly initiated by the first and second defendants and/or in the execution proceedings that resulted in the subject property being auctioned off. Being a court of unlimited jurisdiction the power to set aside the earlier order found to be null and void *ex debito justitae* ought to be invoked and exercise, *inter alia*, on these grounds:

(a) Any dealing subsequent to the notice of seizure dated 15 February 2010 is a nullity, void, and unlawful and liable to be defeated and set aside;

(b) Any dealing subsequent to the AMLA Order dated 27 October 2011 is a nullity, void and unlawful and liable to be defeated and set aside;

(c) The service of the writ and statement of claim on Harris who had left the jurisdiction is null and void leading to the judgment in default order dated 17 September 2012 to be a nullity and unlawful, that was liable to be set aside; and

(d) The removal of the PDRM's caveat was irregular and therefore also liable to be set aside.

[21] For the foregoing reasons, I held that the plaintiff as the actual and beneficial owner of the subject property had been gravely prejudiced and denied its lawful right to the subject property as a consequence of the fraud committed by the aforementioned perpetrators ('the Pakistani criminals') and the acts or omissions of the first and second, fourth and fifth defendants. The circumstances of this case require that the original position of the parties and the property be restored to *status quo* as it should have been after issuance of the notice of seizure by the PP. I, accordingly, granted the declaration and orders prayed for with costs of RM5,000 to be paid by defendants (1) and (2) jointly and severally and RM3,000 to be paid by defendant (5).